HIGH COURT OF JAMMU AND KASHMIR AT SRINAGAR

Criminal Appeal No.05/2003

Date of decision : 18th of July, 2007

Ghulam Mohammad Dar **V/s** **State of J & K**

Coram:

Hon'ble Mr. Justice Virender Singh

Appearing Counsel:

For the Appellant(s) : Mr. M.H. Attar, Advocate.
For the Respondent(s) : Mr. M.A. Rathore, Additional Advocate General.

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i) Whether approved for reporting in Press/Media **: Yes/No.**
ii) Whether to be reported in Digest/Journal **: Yes/No.**

The appellant stands convicted and sentenced under Section 456 of RPC vide impugned judgment of learned Sessions Judge, Badgam, dated 29-04-2003 and order dated 02-05-2003. The sentence slapped upon him is to undergo rigorous imprisonment for a period of eight months and to pay a fine of Rs.500/-, in default thereof to further undergo a simple imprisonment for ten days. Aggrieved by the same, he preferred the instant appeal.

At the very outset, it has been disclosed by Mr. M.H. Attar, learned counsel for the appellant, that the appellant has already served his substantive sentence of about seven months and a few odd days. He is on bail now.

It is worth mentioning here that Tariq Ahmed Sheikh, the co-accused of the appellant, charged under Sections 302 and 307 RPC, stands acquitted by the learned trial Court. Admittedly, State has not

preferred any appeal against the acquittal earned by him. The appellant was charged under Section 456 RPC only.

The prosecution case, in brief, is as under:

Wazeera is the deceased in this case, who was wife of real brother of Tariq Ahmed Sheikh (since acquitted). Shaheena alias Dazi, a star witness to the occurrence, is the sister of above said Tariq Ahmed Sheikh. She also received injuries in this occurrence. In fact, Shaheena alias Dazi and Wazeera had received injuries at the hands of Tariq Ahmed Sheikh, who was allegedly armed with a dagger (knife). The allegations against the present appellant are that he had established illicit sexual contacts with Shaheena, PW, and at the night intervening 6th/7th July, 1998, he had entered into the house of Shaheena alias Dazi. When Tariq Ahmed Sheikh found him talking to his sister, he got angry and started beating Shaheena. She received knife injuries at the hands of her brother. Wazeera (since deceased) wife of Abdul Rashid, (the real brother of Tariq Ahmed Sheikh) also arrived at the spot to save Shaheena, but Tariq Ahmed Sheikh injured her also with the dagger (knife) and, ultimately, she succumbed to the injuries in the hospital. On these allegations, the case was registered with the concerned Police, which ended into filing of the challan against the appellant and the aforesaid Tariq Ahmed Sheikh. Both were charged accordingly, as stated hereinabove.

I do not feel the necessity of reproducing the entire evidence, as the prosecution case is primarily hinging upon the statement of

Shaheena, the injured star witness, who happened to be in the house at the time of occurrence. She did not support the case of the prosecution before the trial Court and was declared hostile. The learned trial Court, while discussing her evidence in detail and also taking into consideration the other inherent flaws in the case of the prosecution, acquitted Tariq Ahmed Sheikh.

For the purposes of convicting the present appellant, the learned trial Court observed that the accusation against him is that he has committed lurking house-trespass into the house of PW Ghulam Mohammad Sheikh (father of Shaheena alias Dazi) at the relevant point of time, i.e., between 10 p.m. to 11.00 p.m. during intervening night of 7th/8th July, 1998. It is then observed that so far as entry of the appellant is concerned, it is not disputed inasmuch as even PW Shaheena alias Dazi, to whom he was stated to have had some intimacy, has not excluded his presence, and once his entry and his presence in the house is established, the intention of being there at the late hours of the night and without knowledge of the house owner could not have been good. The learned trial Court then observed that the appellant was an official of the Police Department, and at the relevant point of time was supposed to be at the Police Station itself and his presence on the spot at that odd time is quite inexplicable. According to learned trial Court, his entry in the house, in fact, had annoyed the inmates which led to the present episode and, therefore, this all was enough to hold him guilty under Section 456 RPC.

Mr. Attar vehemently contends that the evidence on record does not bring the case of the appellant within the mischief of Section 456 RPC and it appears that the Court has given a moral tilt to the case instead of discussing the evidence on record. Dwelling upon his arguments, the learned counsel then contends that the main accused in the case was Tariq Ahmed Sheikh, who has been given clean chit by the trial Court for the main charge of Sections 302 and 307 RPC, finding that the prosecution evidence is weak against him. The main reason is that Shaheena did not support the case of the prosecution. Even if one reads the statement of Shaheena alias Dazi, who otherwise has been declared hostile, it cannot be said that it was a case of lurking house-trespass by night or house breaking by night by the appellant, so as to hold him guilty under Section 456 RPC. The learned counsel has read the entire evidence before me in support of his contentions.

On the basis of the aforesaid submissions, Mr. Attar prays for acquittal of the accused, which is opposed by the learned counsel for the State, contending that the presence of the appellant during night hours in the house of Shaheena itself is sufficient to maintain his conviction under Section 456 RPC.

After hearing the rival contentions of learned counsel for both the sides and going through the records minutely, I am of the view that the prosecution has failed to prove the charge of Section 456 RPC to the hilt against the accused and, therefore, he deserves acquittal.

So far as the case of the appellant is concerned, it revolves round the statement of Shaheena alias Dazi only. I have once again gone through her entire statement very carefully. She stated that on 6th of July, 1998, the appellant had come to their house at about 8.00 p.m. and asked about his brother Abdul Rashid, the husband of Wazeera (since deceased) and she disclosed that he had gone to Gulmarg. She further stated that, in the meantime, Tariq Ahmed Sheikh reached there and there was a scuffle between them. She did not whisper a word as to how she had received the injury. With regard to the injury received by Wazeera (since deceased), wife of Abdul Rashid, Shaheena again saved Tariq Ahmed Sheikh. At this juncture, she was declared hostile and cross-examined by the PP. In her cross-examination, she had categorically stated that the appellant used to come to their residence earlier also and he had come at 8/9 times.

From the aforesaid evidence, it cannot be concluded that the entry of the appellant in the house was in the shape of lurking house-trespass by night or house breaking by night. Lurking house-trespass is defined in Section 443 of RPC, which reads that whoever commits house-trespass having taken precautions to conceal such house-trespass from such person, who has a right to exclude or eject the trespasser from the building, tent or vessel, which is the subject of the trespass, is said to commit “lurking house-trespass”. If one reads the evidence of Shaheena alias Dazi, the star witness of the prosecution, in my view, the case of the appellant does not fall within the mischief of lurking

house-trespass. Technically, the case of the appellant is not of house breaking also and, therefore, it cannot be said that he has committed house breaking by night, so as to punish him under Section 456 RPC, where the punishment of lurking house-trespass or breaking house by night is provided.

Another material fact, which cannot be lost sight of, is that it is the case of Shaheena herself that the appellant was having friendly relations with her brother and that is the reason that he was a frequent visitor to their house. Even on the date of occurrence, he asked about his friend (brother of Saheena), who was incidentally out of house, without visualizing as to what would be the reaction of Tariq Ahmed Sheikh on his routine entry to the house. Even if Tariq Ahmed Sheikh was having any doubt in his mind about any illicit relation of the appellant with Shaheena alias Dazi, that cannot be stretched to the extent that the appellant had committed offence of lurking house-trespass or house breaking by night. It was after all a reaction of a particular person to a particular situation. For that the appellant cannot be blamed at all.

It appears to me that the Court has more or less given a moral tilt to the present case while holding the appellant guilty for the charge, whereas the prosecution case is stumbling badly qua him on all counts. Moral conviction has no place in criminal jurisprudence and the Court is not expected to be swayed by any sentiment as this approach cannot sustain in the eyes of law.

In view of the aforesaid discussion, I find no hesitation in concluding that the prosecution has not been able to prove its case against the appellant beyond any shadow of reasonable doubt, so as to maintain his conviction for the offence he was charged with. Consequently, the impugned judgment of conviction and sentence deserves to be set aside. Ordered accordingly.

The next result is that the instant appeal is allowed and the appellant is acquitted of the charge. He is discharged of his bail bonds forthwith furnished by him during the pendency of the instant appeal.

Srinagar *(Virender Singh)*
July 18, 2007 *Judge*
T.Arora, PS